

Public Chapter 533

HOUSE BILL NO. 1573

By Representative Kisber

Substituted for: Senate Bill No. 1820

By Senators Gilbert, Jordan

AN ACT to amend Tennessee Code Annotated, Title 4; Title 38; Title 39; Title 50 and Title 56, relative to employees and employers.

WHEREAS, The Workers' Compensation Reform Act of 1996 enacted significant changes in the Workers' Compensation Law; and

WHEREAS, In the course of initial implementation of such significant legislation the need for a variety of changes to materially assist the implementation of the Reform Act became apparent; and

WHEREAS, The Special Joint Committee of the General Assembly on Workers' Compensation has monitored implementation of the Reform and recommends certain changes in the Workers' Compensation Law; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 50-6-130, is amended by adding the following as a new subsection:

() The committee shall promptly review and comment on any bill referred to the committee by a standing committee of the General Assembly. The absence of comment by the committee shall not prohibit any standing committee from acting on a bill. The committee shall review legislation referred to it for comment with respect to its impact on the following:

- (1) accidents and workplace safety;
- (2) adequacy of benefits;
- (3) stability and adequacy of relevant insurance markets;
- (4) the system of claim and dispute resolution; and
- (5) such other matters as the committee may deem relevant.

SECTION 2. Tennessee Code Annotated, Section 50-6-204(a)(1), is amended by adding the following new language at the end of the subdivision:

If an employer or an insurer has not previously requested copies of such records from a physician or hospital, then an attorney for an employer may request such records under this subdivision.

SECTION 3. Tennessee Code Annotated, Section 50-6-205(b)(2), is amended by adding the following language at the end of the subdivision: "Evidence of the initiation or denial of such compensation is inadmissible in a subsequent proceeding concerning the issue of the compensability of injury."

SECTION 4. Tennessee Code Annotated, Section 50-6-208(f), is amended by adding the following language at the end of the subsection: "Expenses relating to private legal counsel retained pursuant to this subsection shall be paid from the second injury fund."

SECTION 5. Tennessee Code Annotated, Section 50-6-235(d), is amended by adding the following language at the end of the subsection:

Prior to acting on the proposed rule, the Commissioner shall submit the proposed rule to the Special Joint Committee on workers' compensation of the General Assembly for its review and comment. The committee shall have forty-five (45) days to review the proposed rule and transmit any comment it may have to the Commissioner.

SECTION 6. Tennessee Code Annotated, Section 50-6-416, is amended by deleting the section in its entirety.

SECTION 7. Tennessee Code Annotated, Section 50-9-111, is amended by adding the following as a new subsection:

() Prior to acting on the proposed rule to implement the provisions of this chapter, the Commissioner of Labor shall submit the proposed rule to the Special Joint Committee on workers' compensation of the General Assembly for its review and comment. The committee shall have forty-five (45) days to review the proposed rule and transmit any comment it may have to the Commissioner.

SECTION 8. Tennessee Code Annotated, Section 56-5-302(13), is amended by deleting the item and by substituting instead the following language:

(13) "Multiplier" means a workers' compensation insurance company's determination of the profits and expenses, other than loss expense and loss adjustment expense, and deviation from advisory prospective loss costs as permitted by Section 9 of this act, associated with writing workers' compensation insurance, which shall be expressed as a single multiplicative factor to be applied equally and uniformly to the advisory prospective loss costs approved by the Commissioner in making rates for all classification of risks utilized by such company; and

SECTION 9. Tennessee Code Annotated, Title 56, Chapter 5, Part 3, is amended by adding the following as a new section to be appropriately designated:

Section _____. (a) Any multiplier that includes a deviation from advisory prospective loss costs in excess of twenty percent (20%) shall be approved by the Commissioner prior to use. The Commissioner shall also make a finding that the approval of such deviation will not lessen competition or create instability in pricing in the market. All deviations in excess of twenty percent (20%) approved by the Commissioner shall be reported in writing to the advisory committee on workers' compensation and to the Special Joint Committee on workers' compensation of the General Assembly. The Commissioner shall not approve a deviation in excess of twenty percent (20%) if the deviation would

result in a loss cost that is excessive, inadequate or unfairly discriminatory or if such loss cost does not reasonably reflect projected losses, including loss adjustment expenses.

(b) The provisions of subsection (a) shall not apply to filings made on or after July 1, 1999. Filings made on or after July 1, 1999 shall be considered by the commissioner pursuant to Tennessee Code Annotated, Title 56, Chapter 5, Part 3.

SECTION 10. Tennessee Code Annotated, Section 56-5-306(c), is amended by adding the following at the end of the subsection:

Multipliers shall apply to the most recently approved, currently effective advisory prospective loss cost. For all multipliers subject to the requirements of Section 10, every insurer of workers' compensation insurance shall file with the Commissioner all multipliers and supporting information, at least thirty (30) days before the proposed effective date.

SECTION 11. Tennessee Code Annotated, Section 56-5-308(b)(2), is amended by adding the following language at the end of the subdivision:

In disputes concerning a multiplier, the insurer shall have the burden of persuasion that the Commissioner's disapproval or failure to approve was inappropriate.

SECTION 12. Tennessee Code Annotated, Section 56-5-313, is amended by designating the existing language as subsection (a) and by adding the following as subsection (b):

(b) Any workers' compensation insurer may make written application to the Commissioner for approval on its behalf of a deductible plan where the insurer can be reimbursed by the policyholder, effective for a period of not less than one (1) year, to be applied to the rates and/or premiums produced by the rating system. Such application shall specify the basis for the modification and a copy thereof shall also be sent simultaneously to the rate service organization. The Commissioner shall approve the modification for such insurer if the Commissioner finds it to be justified. The Commissioner shall not approve such modification if the Commissioner finds that the resulting premiums would be excessive, inadequate or unfairly discriminatory.

SECTION 13. Tennessee Code Annotated, Section 56-5-314(c), is amended by adding the following as a new subdivision (7):

(7) (A) The Commissioner shall not approve a plan pursuant to this subsection which does not provide for the making available of a list of the employers insured under this subsection on request to interested persons for a reasonable fee or to the department. Reasonable fee shall only include the cost of production and mailing such list.

(B) As part of the application for insurance coverage, an employer shall elect whether to be excluded from the list provided for by this subsection. Every application for the assigned risk plan shall include the following language:

THE INSURED ELECTS TO BE EXCLUDED FROM THE LIST
OF EMPLOYERS IN THE ASSIGNED RISK PLAN:

___ YES

___ NO

SECTION 14. Tennessee Code Annotated, Section 56-5-314(c)(6)(B), is amended by deleting the item in its entirety and by substituting instead the following:

(B) The advisory prospective loss cost for subdivisions (A)(i) and (ii) may not exceed that approved by the Commissioner for the voluntary market. The Commissioner shall annually establish the multiplier to be applied to the advisory prospective loss cost for the assigned risk plan. In establishing such multiplier the Commissioner shall consider the estimated cost of providing required services pursuant to this subsection and the level of the multipliers in the voluntary market.

SECTION 15. Tennessee Code Annotated, Section 56-5-320(b), is amended in the second sentence by inserting the language “and rating rules” between the words “forms” and “filed”.

SECTION 16. Tennessee Code Annotated, Section 56-5-320(c), is amended by deleting the language “rating plan that has” and by substituting instead the language “and retrospective rating plans that have”.

SECTION 17. Tennessee Code Annotated, Section 50-9-101(a), is amended by deleting the subsection in its entirety and by substituting instead the following:

(a) It is the intent of the General Assembly to promote drug-free workplaces in order that employers in this State be afforded the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace and reach their desired levels of success without experiencing the costs, delays and tragedies associated with work-related accidents resulting from drug or alcohol abuse by employees. It is further the intent of the General Assembly that drug and alcohol abuse be discouraged and that employees who choose to engage in drug or alcohol abuse face the risk of unemployment and the forfeiture of workers' compensation benefits.

SECTION 18. Tennessee Code Annotated, Section 50-9-102, is amended by adding the following language at the end of the section:
Nothing in the program authorized by this chapter is intended to authorize any employer to test any applicant or employee for alcohol or drugs in any manner inconsistent with federal constitutional or statutory requirements, including those imposed by the Americans with Disabilities Act and the National Labor Relations Act.

SECTION 19. Tennessee Code Annotated, Section 50-9-103(4), is amended by deleting the item in its entirety and by substituting instead the following:

(4) “Drug” means any substance subject to testing pursuant to drug testing regulations adopted by the United States Department of Transportation. The Commissioner of Labor may add additional drugs by rule in accordance with Section 50-9-111.

SECTION 20. Tennessee Code Annotated, Section 50-9-103, is amended in items (2), (5), (8), (10), (11) and (15), by inserting the language “or alcohol” immediately after the language “drug” wherever it appears as a single word.

SECTION 21. Tennessee Code Annotated, Section 50-9-103(13), is amended by deleting the item in its entirety.

SECTION 22. Tennessee Code Annotated, Section 50-9-103(14), is amended by deleting the item in its entirety and by substituting instead the following:

(14) "Reasonable-suspicion drug testing" means drug or alcohol testing based on a belief that an employee is using or has used drugs or alcohol in violation of the covered employer's policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. Among other things, such facts and inferences may be based upon:

(A) Observable phenomena while at work, such as direct observation of drug or alcohol use or of the physical symptoms or manifestations of being under the influence of a drug or alcohol;

(B) Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance;

(C) A report of drug or alcohol use, provided by a reliable and credible source;

(D) Evidence that an individual has tampered with a drug or alcohol test during employment with the current covered employer;

(E) Information that an employee has caused, contributed to or been involved in an accident while at work; or

(F) Evidence that an employee has used, possessed, sold, solicited or transferred drugs or used alcohol while working or while on the covered employer's premises or while operating the covered employer's vehicle, machinery or equipment;

SECTION 23. Tennessee Code Annotated, Section 50-9-103(16), is amended by deleting the word "drugs" and by substituting instead the language "alcohol or drugs".

SECTION 24. Tennessee Code Annotated, Section 50-9-103, is amended by adding the following as new items to be appropriately designated:

() "Alcohol" shall have the same meaning in this chapter as the word does when used in the federal regulations describing the procedures used for testing of alcohol by programs operating pursuant to the authority of the United States Department of Transportation, currently compiled at 49 C.F.R. part 40. It is intended that the definition shall change as the Department of Transportation's regulations are revised.

() "Alcohol test" means an analysis of breath, or blood, or any other analysis which determines the presence and level or absence of alcohol as authorized by the United States Department of Transportation in its rules and guidelines concerning alcohol testing and drug testing.

SECTION 25. Tennessee Code Annotated, Section 50-9-104, is amended in the second sentence of the existing section by inserting the language "or alcohol" immediately after the word "drug" and by deleting the first sentence of the section and by substituting instead the following:

A covered employer may test a job applicant for alcohol or for any drug described in § 50-9-103; provided, that for public employees such testing shall be limited to the extent permitted by the Tennessee and federal constitutions. A covered

employer may test an employee for any drug defined in Section 50-9-103(4) and at any time set out in Section 50-9-106. An employee who is not in a safety-sensitive position, as defined in Section 50-9-103(15), may be tested for alcohol only when the test is based upon reasonable suspicion as defined in Section 50-9-103(14). An employee in a safety-sensitive position may be tested for alcohol use at any occasion described in Section 50-9-106(a)(2) --(5), inclusive.

SECTION 26. Tennessee Code Annotated, Section 50-9-104, is amended by designating the existing language as subsection (a) and by adding the following as new subsections (b) and (c):

(b) The Commissioner of Labor shall adopt a form pursuant to rulemaking authority, which form shall be used by the employer to certify compliance with the provisions of this chapter. Substantial compliance in completing and filing the form with the Commissioner of Labor shall create a rebuttable presumption that the employer has established a drug-free workplace program and is entitled to the protection and benefit of this chapter. Prior to granting any premium credit to an employer pursuant to Section 50-6-418, all insurers and self-insured pools under Chapter 6, Part 4, of this title, shall obtain such form from the employer. Not less than monthly insurers and self-insured pools shall submit such forms to the Department of Labor. Any other employer desiring to establish a drug-free workplace shall file such form with the Department of Labor.

(c) It is intended that any employer required to test its employees pursuant to the requirements of any federal statute or regulation shall be deemed to be in conformity with this section as to the employees it is required to test by those standards and procedures designated in that federal statute or regulation. All other employees of such employer shall be subject to testing as provided in this chapter in order for such employer to qualify as having a drug-free workplace program.

SECTION 27. Tennessee Code Annotated, Section 50-9-105, is amended in subdivisions (a)(1), (a)(6), (a)(7), and (a)(8), by inserting the words "or alcohol" immediately after each use of the single word "drug" wherever it appears in such subdivisions.

SECTION 28. Tennessee Code Annotated, Section 50-9-105(a)(4), is amended by deleting the language "both before and" and by adding immediately after the language "tested" the following language:

" , but only if the testing process has revealed a positive result for the presence of alcohol or drug use"

SECTION 29. Tennessee Code Annotated, Section 50-9-105(a)(5), is amended by deleting the subdivision in its entirety.

SECTION 30. Tennessee Code Annotated, Section 50-9-105(a)(10), is amended by deleting the subdivision and by substituting instead the following:

(10) A list of all drug classes for which the employer may test.

SECTION 31. Tennessee Code Annotated, Section 50-9-105(c), is amended by deleting the subsection in its entirety and by substituting instead the following:

(c) A covered employer shall include notice of drug and alcohol testing on vacancy announcements for positions for which drug or alcohol testing is required. A notice of the covered employer's drug and alcohol testing policy must also be posted in an appropriate and conspicuous location on the covered employer's premises, and copies of the policy must be made available for inspection by the employees or job applicants of the covered employer during regular business hours in the covered employer's personnel office or other suitable locations.

SECTION 32. Tennessee Code Annotated, Section 50-9-105(d), is amended in the first sentence by inserting the language "or any applicable labor law" immediately after the word "agreement".

SECTION 33. Tennessee Code Annotated, Section 50-9-105, is amended by adding the following as new subsection:

() The Commissioner of Labor shall develop a model notice and policy for drug free workplace programs.

SECTION 34. Tennessee Code Annotated, Section 50-9-106(a)(1), is amended in the first sentence by inserting the language "after a conditional offer of employment" between the language "must" and "require".

SECTION 35. Tennessee Code Annotated, Section 50-9-106(a)(1), is amended by inserting the following language immediately after the first sentence:

An employer may but is not required to test job applicants, after a conditional offer of employment, for alcohol.

SECTION 36. Tennessee Code Annotated, Section 50-9-106(a), is amended in the first sentence of the subsection and in subdivisions (2), and (5), by inserting the language "or alcohol" immediately after each use of the single unhyphenated word "drug".

SECTION 37. Tennessee Code Annotated, Section 50-9-106(a)(1), is amended by deleting the language "REASONABLE SUSPICION DRUG TESTING" and by substituting instead the language "REASONABLE SUSPICION DRUG AND ALCOHOL TESTING".

SECTION 38. Tennessee Code Annotated, Section 50-9-106(a)(4), is amended by deleting the subdivision in its entirety and by substituting instead the following:

Follow-up drug testing. If the employee in the course of employment enters an employee assistance program for drug-related or alcohol-related problems, or a drug or alcohol rehabilitation program, the covered employer must require the employee to submit to a drug and alcohol test, as appropriate, as a follow-up to such program, unless the employee voluntarily entered the program. In those cases, the covered employer has the option to not require follow-up testing. If follow-up testing is required, it must be conducted at least once a year for a two-year period after completion of the program. Advance notice of a follow-up testing date must not be given to the employee to be tested; and

SECTION 39. Tennessee Code Annotated, Section 50-9-106(b), is amended by inserting the following language immediately after the word "drugs" and before the punctuation "." at the end of the subsection: "or alcohol that is in addition to the minimum testing required under this chapter".

SECTION 40. Tennessee Code Annotated, Section 50-9-107(a), is amended by deleting the language "drugs" and by substituting instead the language "drugs and alcohol".

SECTION 41. Tennessee Code Annotated, Section 50-9-107(d), is amended by deleting the language of the section in its entirety and by substituting instead the following:

(d) A covered employer shall pay the cost of all drug and alcohol tests, initial and confirmation, which the covered employer requires of employees. An employee or job applicant shall pay the costs of any additional drug or alcohol tests not required by the covered employer.

SECTION 42. Tennessee Code Annotated, Section 50-9-107(e), is amended by deleting the subsection in its entirety and by substituting instead the language:

(e) A covered employer shall not discharge, discipline or discriminate against an employee solely upon the employee's voluntarily seeking treatment, while under the employ of the covered employer, for a drug-related or alcohol-related problem if the employee has not previously tested positive for drug or alcohol use, entered an employee assistance program for drug-related or alcohol-related problems or entered a drug or alcohol rehabilitation program. Unless otherwise provided by a collective bargaining agreement, a covered employer may select the employee assistance program or drug or alcohol rehabilitation program if the covered employer pays the cost of the employee's participation in the program. However, nothing in this chapter is intended to require any employer to permit or provide such a rehabilitation program.

SECTION 43. Tennessee Code Annotated, Section 50-9-107(f), is amended by inserting the language "or alcohol" immediately after the word "drug" in the first sentence.

SECTION 44. Tennessee Code Annotated, Section 50-9-108, is amended by deleting the section in its entirety and by substituting instead the following:

(a) An employee or job applicant whose drug or alcohol test result is confirmed as positive in accordance with this section shall not, by virtue of the result alone, be deemed to have a "handicap" or "disability" as defined under federal, state or local handicap and disability discrimination laws.

(b) A covered employer who discharges or disciplines an employee or refuses to hire a job applicant in compliance with this section is considered to have discharged, disciplined or refused to hire for cause.

(c) No physician-patient relationship is created between an employee or job applicant and a covered employer or any person performing or evaluating a drug or alcohol test, solely by the establishment, implementation or administration of a drug or alcohol testing program. This section in no way relieves the person performing the test from responsibility for acts of negligence in performing the tests.

(d) Nothing in this section shall be construed to prevent a covered employer from establishing reasonable work rules related to employee possession, use, sale or solicitation of drugs or alcohol, including convictions for offenses relating to drugs or alcohol, and taking action based upon a violation of any of those rules.

(e) This section does not operate retroactively, and does not abrogate the right of an employer under state law to lawfully conduct drug or alcohol tests, or implement lawful employee drug-testing programs. The provisions of this chapter shall not prohibit an employer from conducting any drug or alcohol testing of employees which is otherwise permitted by law.

(f) If an employee or job applicant refuses to submit to a drug or alcohol test, the covered employer is not barred from discharging or disciplining the employee or from refusing to hire the job applicant. However, this subsection does not abrogate the rights and remedies of the employee or job applicant as otherwise provided in this section.

(g) This section does not prohibit an employer from conducting medical screening or other tests required, permitted or not disallowed by any statute, rule or regulation for the purpose of monitoring exposure of employees to toxic or other unhealthy substances in the workplace or in the performance of job responsibilities. Such screening or testing is limited to the specific substances expressly identified in the applicable statute, rule or regulation, unless prior written consent of the employee is obtained for other tests. Such screening or testing need not be in compliance with the rules adopted by the Department of Labor and Department of Health. If applicable, such drug or alcohol testing must be specified in a collective bargaining agreement as negotiated by the appropriate certified bargaining agent before such testing is implemented.

(h) No cause of action shall arise in favor of any person based upon the failure of an employer to establish a program or policy for drug or alcohol testing.

SECTION 45. Tennessee Code Annotated, Section 50-9-109, is amended by deleting the section in its entirety and by substituting instead the following:

(a) All information, interviews, reports, statements, memoranda and drug or alcohol test results, written or otherwise, received by the covered employer through a drug or alcohol testing program are confidential communications and may not be used or received in evidence, obtained in discovery or disclosed in any public or private proceedings, except in accordance with this section or in determining compensability under this chapter.

(b) Covered employers, laboratories, medical review officers, employee assistance programs, drug or alcohol rehabilitation programs and their agents who receive or have access to information concerning drug or alcohol test results shall keep all information confidential. Release of such information under any other circumstance is authorized solely pursuant to a written consent form signed voluntarily by the person tested, unless such release is compelled by a hearing officer or a court of competent jurisdiction pursuant to an appeal taken under this section, relevant to a legal claim asserted by the employee or is deemed appropriate by a professional or occupational licensing board in a related disciplinary proceeding. The consent form must contain, at a minimum:

- (1) The name of the person who is authorized to obtain the information;
- (2) The purpose of the disclosure;
- (3) The precise information to be disclosed;
- (4) The duration of the consent; and

(5) The signature of the person authorizing release of the information.

(c) Information on drug or alcohol test results for tests administered pursuant to this chapter shall not be released or used in any criminal proceeding against the employee or job applicant. Information released contrary to this section is inadmissible as evidence in any such criminal proceeding.

(d) This section does not prohibit a covered employer, agent of such employer or laboratory conducting a drug or alcohol test from having access to employee drug or alcohol test information or using such information when consulting with legal counsel in connection with actions brought under or related to this section, or when the information is relevant to its defense in a civil or administrative matter. Neither is this section intended to prohibit disclosure among management as is reasonably necessary for making disciplinary decisions relating to violations of drug or alcohol standards of conduct adopted by an employer.

SECTION 46. Tennessee Code Annotated, Section 50-9-110, is amended by deleting the section in its entirety and by substituting instead the following:

A laboratory may not analyze initial or confirmation test specimens unless:

(1) The laboratory is licensed and approved by the Department of Health, using criteria established by the United States Department of Health and Human Services as guidelines for modeling the state drug free testing program pursuant to this section, or the laboratory is certified by the United States Department of Health and Human Services, the College of American Pathologists or such other recognized authority approved by rule by the Commissioner of Labor; and

(2) The laboratory complies with the procedures established by the United States Department of Transportation for a workplace drug test program or such other recognized authority approved by the Commissioner of Labor.

(3) Confirmation tests may only be conducted by a laboratory that meets the requirements of (1) and (2) and is certified by either the Substance Abuse and Mental Health Services Administration or the College of American Pathologists - forensic urine testing programs.

SECTION 47. Tennessee Code Annotated, Section 50-9-111, is amended by deleting subsections (a) and (b) in their entirety and by substituting instead the following:

(a) The Commissioner of Labor is authorized to adopt rules, using the rules and guidelines adopted by the Department of Health and criteria established by the United States Department of Health and Human Services and the United States Department of Transportation as guidelines for modeling the state drug and alcohol testing program, concerning, but not limited to:

(1) Standards for licensing drug and alcohol testing laboratories and suspension and revocation of such licenses;

(2) Body specimens and minimum specimen amounts that are appropriate for drug or alcohol testing;

(3) Methods of analysis and procedures to ensure reliable drug or alcohol testing results, including the use of breathalyzers and standards for initial tests and confirmation tests;

(4) Minimum cut-off detection levels for alcohol, each drug or metabolites of such drug for the purposes of determining a positive test result;

(5) Chain-of-custody procedures to ensure proper identification, labeling and handling of specimens tested; and

(6) Retention, storage and transportation procedures to ensure reliable results on confirmation tests and retests.

(b) The Commissioner of Labor is authorized to adopt relevant federal rules concerning drug and alcohol testing as a minimum standard for testing procedures and protections which the Commissioner may exceed. All such rules shall be promulgated in accordance with the Uniform Administrative Procedures Act, compiled in Title 4, Chapter 5.

SECTION 48. Tennessee Code Annotated, Section 50-9-111, is amended by adding the following as a new subsections:

() The Commissioner of Labor is authorized to set education program requirements for drug-free workplaces by rules promulgated in accordance with the requirements of Tennessee Code Annotated, Title 4, Chapter 5. Such requirements shall not be more stringent than the federal requirements for workplaces regulated by United States Department of Transportation rules.

SECTION 49. Tennessee Code Annotated, Section 50-6-121(d), is amended by adding the following language at the end of the subsection:

Employees of the council shall not have the status of career service employees pursuant to Title 8.

SECTION 50. Tennessee Code Annotated, Section 50-6-405(c)(1), is amended in the second sentence by adding the words "in Tennessee" between the words "existence" and "for".

SECTION 51. Tennessee Code Annotated, Section 50-6-401(d), is amended by deleting the reference "1994" after "June 30," and after the word "aforementioned" and by substituting instead the reference "1996."

SECTION 52. This act shall take effect upon becoming a law, the public welfare requiring it. The provisions of Sections 12,14,15, and 16 shall apply to events occurring on and after January 1, 1997.